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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 361.

THE UNITED STATES OF AMERICA,
Cross-Petitioner,

against

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, as Owner of the American Steamship *HAWAIIAN*,
Cross-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE CROSS-PETITION OF THE UNITED STATES FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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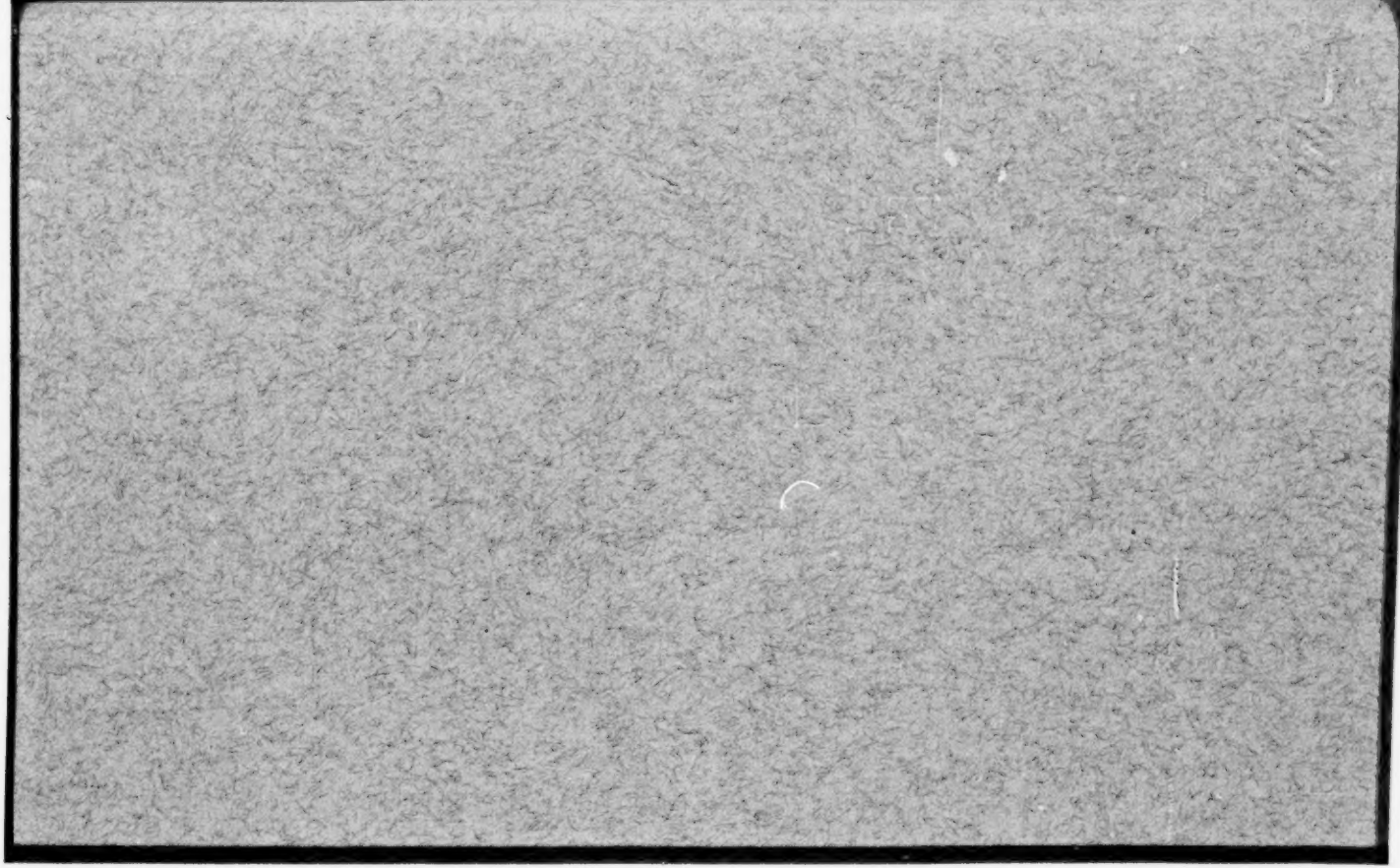

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Preliminary Statement.

The cross-petition[1] of the United States asks review of a judgment of the Court of Claims awarding cross-respondent, American-Hawaiian Steamship Company, hire at the rate of $2.50 per deadweight ton per month as just compensation for the use of its freight steamer *Hawaiian*

[1] The petition of American-Hawaiian Steamship Company for certiorari was filed on July 29, 1955 and is No. 273, October Term, 1955. For convenience of reference in this brief to the respective parties to the cross-petition, the United States, cross-petitioner, will generally be called the "government" and the American-Hawaiian Steamship Company, cross-respondent, will generally be called the "shipowner".

while under requisition of use on "bareboat basis"[2] by the War Shipping Administration from July 7, 1943 to May 1, 1946. (Findings 1, 32, App.[3] 87, 116; 129 C. Cls. 365 at 373, 374, 400.)

The lack of substance in the propositions of fact and law suggested in the cross-petition will be more apparent when considered in the light of a brief statement of some of the main features of the case.

The basic issues arise out of a program[4] initiated in mid-1941 by the United States Maritime Commission and

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[2] Requisition on "bareboat basis" means that the government took over the entire possession and operation of the vessel. (See Finding 9, App. 92.) This contrasts with the prior requisition on "time charter basis" under which the shipowner retained possession and operation of the vessel and paid for crew, supplies, repairs and insurance (except war risk insurance). (See also Finding 9, cited above.)

[3] References preceded by "App." are to the portions of the record which are printed in the "Appendix" to shipowner's petition filed in Docket No. 273.

[4] Particulars of the program are described in Findings Nos. 20-28 of the Court of Claims (App. 101-111). Additional particulars are given in the Commissioner's Findings Nos. 24-32, App. 58-73. Among the program's chief features were four rate schedules. Two schedules of maximum time charter rates were issued by the Commission on July 30, 1941 and January 5, 1942, respectively, under the Ship Warrants Act of July 14, 1941. Those were followed by two schedules of requisition rates issued by the War Shipping Administration, the first being in March, 1942, in connection with the general requisition on time charter basis in April, 1942, and the second being in April, 1944, in connection with the general requisitioning on bareboat basis in 1943. In contrast to the time charter rate of $7.50 per deadweight ton per month (equivalent to $5.61 on "bareboat" basis) which prevailed and was approved by the Commission through July, 1941 (Finding No. 16, App. 98-99), the schedules successively fixed the following rates for a vessel like the *Hawaiian:*

Date of Rate Schedule	Rate Basis	Rate Per Deadweight Ton Per Mo.	Approximate "Bareboat Equivalent"	References To Court Findings
7/30/41	Time Charter	$4.60	$2.71	21(a);16.
1/ 5/42	" "	3.55	1.66	21(c);16.
5/14/42	" "	4.35	2.46	23 ;16.
4/ 7/44	Bareboat	1.28	1.28	2

continued until 1946 by its successor agency, the War Shipping Administration, to force a "roll-back" in ocean transportation rates[5] to 1939 or 1940 levels. The admitted purpose of the program was to enable those agencies to obtain the use of privately-owned ships and ultimately to requisition them at such drastically reduced levels instead of at levels representing current fair and reasonable market values of the use of ships. (App. 125-134; Commissioner's Finding No. 24, App. 58.)

At that time, and until the ships later entered government service, the *Hawaiian* and large American freighters generally were realizing earnings at levels between $5.00 and $6.00 per deadweight ton per month from commercial operations in foreign trade. That earning power was established by actual voyage accounts submitted in evidence covering about 200 voyages of American freighters terminating in 1941 and 1942, and by specific public admissions by officers of the Maritime Commission or the War Shipping Administration. (See Commissioner's Findings Nos. 10-17, App. 47-54; see also p. 7 of the petition in No. 273.) Moreover, such earnings were not derived from war traffic, as the cross-petition wrongfully implies (Finding No. 8, App.

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[5] To avoid confusion, it is important to distinguish between: (a) the common carrier rates (i. e., "berth" or tariff rates) or contract rates charged to shippers for the transportation of goods by a ship; and (b) the rate of earnings which a ship realizes from such carriage.

The value of the use of a ship is determined by the level of her potential earnings whether she is operated by her owner in berth service for his own account or whether her use is transferred to other operators by time charter or by bareboat charter. (Finding No. 9, App. 92-93.)

Increases in the use value of ships after 1939, including increases in time charter rates and bareboat rates, resulted from increases in the volume and value of traffic carried. (Findings Nos. 7 and 8, App. 90-1.) The tariff rates charged to shippers by American freight carriers were not at any time excessive. (Finding No. 7, App. 91.)

91), nor were they "enhanced" by any defense or other needs of the United States. (Finding No. 32, App. 116; see also *Smith-Douglass Co., Inc.* v. *United States,* 1943, 126 C. Cls. 758.) On the contrary, the prevailing levels of American freighter earnings were the result of carriage of goods at fair and reasonable common carrier rates filed with the Maritime Commission, or at charter rates approved by that Commission. (Findings Nos. 7, 8, 16, App. 90-2, 98-9.)

Except for the attempted "roll back" of rates, conditions favored the continuance of such levels of earnings throughout the requisition period if the vessels had remained free of requisition. (Commissioner's Finding No. 21, App. 56-7; Finding No. 17, App. 99.) In fact, the War Shipping Administration itself realized earnings in excess of $5.00 per deadweight ton per month during the requisition period. (See Commissioner's Finding No. 19, App. 55-6.) When requisitions terminated, the shipowner itself again earned comparable levels of profit. (See Commissioner's Finding No. 20, App. 56.)

Thus, the only substantial questions presented to this Court result from the failure of the Court of Claims to adopt the $5.00 to $6.00 level of earning power as the measure of just compensation and from its adoption, instead, of the rate of $2.50 because of the assumed effect which the schedules of "rolled-back" rates would have had on the earning power of the *Hawaiian* if she had remained free of requisition.

In short, the Court of Claims gave effect to the plainly confiscatory price-fixing measures taken by the requisitioning agencies of the government and the main question presented is whether or not the Fifth Amendment protects owners of private property against such confiscation.

No substantial answer to the foregoing is contained either in the "Memorandum" filed by the government in No. 273 or in the cross-petition.

Instead, certain erroneous impressions of fact, prejudicial to the shipowner, are sought to be created by misstatements presumably resulting from unfamiliarity with the record. An unfounded and unjustifiable implication is conveyed that the undisputed levels of ship earning power on which the shipowner founds its case were the result of unconscionable charges by American shipowners. Wholly unsupported suggestions appear that such earnings were "war-inflated"[6] profits and were the result of "an unbalanced market in which a seller could exact exorbitant rates from a desperate buyer"[7] and from "the spiraling prices resulting from the distorted free market."[8]

It is then suggested, without any support whatever, that the schedules of "rolled-back" rates were a legitimate exercise of an assumed government "power to impose controls to terminate such distorted markets".[9]

On those false premises the substance of the government's extraordinary contention is that, "for emergency requisitions * * * in the absence of a free market"[10], the compensation offered by a requisitioning agency should be adopted as the measure of just compensation if: (a) similar offers were generally accepted by other owners of like property[11]; or (b) the property-owner fails to overcome an alleged presumption of correctness or fairness

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[6] Government "Memorandum" in No. 273, at p. 2; Cross-petition at p. 3.

[7] Government "Memorandum" at p. 2.

[8] Cross-petition at p. 29.

[9] Government "Memorandum" at p. 2.

[10] Cross-petition, p. 19.

[11] Cross-petition, Point 2, pp. 19-23.

in the agency offer by proving "peculiar hardship"[12]; or (c) a higher award would be "unjust to the public"[13].

Such contentions are so obviously incompatible with the elementary constitutional principles governing just compensation that no extended reply is necessary. Therefore, this brief will merely indicate a few of the many errors in the cross-petition.

I.

Reply to the Government Contentions Based on the Alleged General "Acceptance" of the Government Rates by the "Shipping Industry."

Aside from a statement of the general importance of the case (p. 19) the government's first "reason for granting the writ" is the proposition that "acceptance" of the government rates by American shipowners was sufficiently wide-spread that such rates became the market rates or at least were thereby shown to be "just".

The government's contention is wholly irreconcilable with the express finding of fact by the Court of Claims (No. 19, App. 100-1), that the government rates "were not market rates nor equivalent to probable fair market rates".

In fact, the extent of the shipping industry's so-called "acceptance" of the requisition rates was clearly both irrelevant and immaterial[14] for the following reasons:

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[12] Cross-petition, Point 3, pp. 23-29.

[13] Cross-petition, Point 4, pp. 29-31.

[14] The shipowner objected repeatedly to the receipt of such evidence, which included more than 4,500 contracts or other papers relating to transactions between the government and third parties. (See Transcript, pp. 638, 671-4, 678-681, 1543, 1699.) The evidence was wholly irrelevant and immaterial and was also subject to the grounds of objection stated in *Wigmore on Evidence*, Sections 29-A, 443, 1904. It was also grossly unfair because it was and is used as a basis for contending that the industry accepted the offers as "just" although it was a practical impossibility for the shipowner to locate and examine the 75 "accepting" shipowners involved regarding the circumstances and reasons on which their acceptances of the requisition charters were actually based.

(1) The so-called "acceptances" had no probative value whatever as evidence that the requisition rates were equivalent to fair market rates because they were not acceptances by "willing but uncompelled" sellers, but were given under compulsion exerted by the requisitioning agency, as the Court of Claims expressly found. (See Opinion, App. 85; Finding 26, App. 107-8; for more particulars see also Commissioner's Finding No. 30, App. 68-70.)

(2) Even if such "acceptances" had not been coerced, the constitutional rights of the non-accepting minority of the industry to a judicial determination of just compensation could not be foreclosed or impaired because, from one motive or another, the majority accepted the government's offers in preference to litigation, which was the only alternative. A referendum is not a lawful substitute for a judicial decision.

(3) Moreover, quite apart from ambiguity of motivation, the "acceptances" were also valueless as an indication of "industry-wide" opinion because of the incompleteness of the list. The government's exhibit listed only about 390 freighters owned by about 79 companies. (Def. Exs. 8 and 8a.) At the time of general requisition, however, the American freighter fleet consisted of about 700 large freighters owned by nearly 200 companies. (Plaintiff's Exhibits 43, 50; *Verkstrom,* Tr. 1119-1124; Commissioner's Finding No. 30, App. 68.)

(4) The decision in *Vogelstein* v. *United States,* 262 U. S. 337, 339, on which the government chiefly relies, has no possible application. In the *Vogelstein* case, the entire copper-producing industry, including Vogelstein, with government concurrence and *by common agreement,* fixed the price to be paid for copper in transactions in the open

market, and the court found that such price had "uniformly prevailed during the period in question". That price, therefore, was the actual market price. Accordingly, the Court held that the plaintiff could not recover more merely because plaintiff's copper which was later requisitioned, had originally been bought by plaintiff at a cost exceeding the market price at the time of requisition.

In the instant case there was no common agreement whatever by members of the industry among themselves on the establishment of market rates or any other action equivalent thereto. Each shipowner decided for himself alone whether or not in his particular circumstances, acceptance of the government offer of compensation was preferable to litigation.

II.

Reply to the Government Contention That an Administrative "Award" of Compensation is *Prima Facie* "Just" and May Not Be Set Aside Unless the Property-Owner Makes a "Positive Showing" of "Peculiar Hardship".

The foregoing is the substance of the government's third "reason for granting the writ" (pp. 23-29).

The government's point begins with an attempted false analogy between the rates of compensation offered by the ship requisitioning agencies and the O. P. A. ceiling prices which this Court applied in determining just compensation in *United States* v. *Felin & Co.*, 334 U. S. 624 and in *United States* v. *Commodities Trading Corp.*, 339 U. S. 121. The falsity of that analogy was demonstrated at pp. 20-24 of the shipowner's petition in No. 273. That demonstration is not challenged by anything in the cross-petition or in the government's "Memorandum" in No. 273.

1. The offers of compensation made to shipowners were pursuant to Section 902C of the Merchant Marine Act, 1936 (46 U. S. C. 1242, printed in full at pp. 120-1 of the Appendix to the petition in No. 273), which specifically and fully protected the rights of shipowners who did not accept the Commission's offers. The statute required 75% of the rate of hire offered to be paid "on account of just compensation" to a non-accepting shipowner and further provided that, "such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use."

The administrative offers of just compensation to the owners of requisitioned ships were, therefore, *ex parte* acts which had no higher evidentiary standing than any other offer. They were not in any sense "awards" or "orders" of an administrative agency acting in a quasi-judicial capacity or subject to the requirements of the "due process" clause of the Fifth Amendment.

Obviously such offers could have no constitutionally valid effect as even *prima facie* determinations of just compensation because the determination of just compensation is a judicial function. *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312.

2. Other important considerations also establish the untenability of the government's proposition that an administrative offer should govern unless the property-owner makes a "positive showing" that the offer "does not constitute just compensation".

Such a proposition would inevitably result in compensation far below the "full and perfect equivalent in money of the property taken" (*United States* v. *Miller,* 317 U. S. 369, 373).

The Constitution entitles a property-owner to have that "equivalent" determined by a court upon the basis of competent and relevant evidence of facts probative of either the fair market value of the property, when there is a market, or the probable fair market value if no actual market exists at the time of taking.

Under the suggested government standard, however, the bare administrative offer would be substituted for probative evidence of the actual or probable fair market value and would govern the determination unless the property-owner proves "peculiar hardship".

The standards proposed for determining "peculiar hardship" are not expressly stated but it is implied that the property-owner should be required to accept any offer which produces a "fair" or "adequate" return for the use of his property.

Obviously those proposals are directly opposed to the fundamental purpose of the Fifth Amendment to protect property-owners against abuse of power by government officers.

A property-owner may not lawfully be compelled to accept less than actual or probable fair market value merely because a requisitioning agency may consider a lesser amount is "adequate" or even generous. This would merely be a confiscation of the difference between the price the property-owner could get for his property in a fair market and the price fixed by the agency.

No one would suggest that the government would be entitled to take, *free of charge*, the use of part of a privately-owned building if it appeared that the owner would still be making a "generous return" from rents received from the remainder of the building. It is just as indefensible, however, to suggest that the government has a right to take the use of the entire building at a rate less

than the fair market rate. In both cases there would obviously be a confiscation of part of the owners' property rights.

3. Moreover, application of the doctrine of "peculiar hardship" would inevitably produce unjust discrimination and chaos. Objective standards for determining the value of a given piece of property would be supplanted by consideration of the circumstances of the owner of the property. For instance, an amount constituting a fair return on the investment of one owner in his vessel might be unfair to an owner who had paid more for another identical vessel not capable of rendering any more valuable service. A doctrine leading to such consequences would be quite irreconcilable with this Court's repeated decisions that acquisition cost, book value, or sentimental or other value of property peculiar to the owner, is irrelevant in determination of just compensation. *United States* v. *New River Collieries Co.*, 262 U. S. 341; *Brooks-Scanlon* v. *United States*, 265 U. S. 106; *Olson* v. *United States*, 292 U. S. 246; *United States* v. *Toronto, etc. Nav. Co.*, 338 U. S. 396.

III.

Reply to the Government's Assertion that the $2.50 Rate Awarded by the Court of Claims Was "Patently Unjust to the Public."

The Government's third "reason for granting the writ," (Cross-petition, pp. 29-31), is a contention of fact—i.e. that compensation at the rate of $2.50 allowed by the Court of Claims would be "excessive" and, therefore, "unjust to the public."

The foregoing contention is subject to many answers.

1. Certiorari is not granted by this Court merely to review a finding of fact made by a lower court.

2. The government's contention is also irrelevant to any issue in this case. Just compensation turns on the determination of an objective fact—the actual or probable fair market value of the property taken at the time of taking. Because the government has no duty to indemnify the property owner against any loss resulting from application of that objective standard, (*Vogelstein* v. *United States,* 262 U. S. 337), it necessarily follows that the government has no right to deny or limit any resulting profit. Therefore, the degree of the shipowner's profit or loss, whether great or small, was not an issue in this case and government's contention of "excessive" profit is clearly irrelevant.

3. No possible "injustice to the public" can ever result from the payment of a *fair* market price for private property taken for public use. In any event, no matter what the profit to the property-owner may be, the public is protected against excess wartime profits by taxation on principles applicable uniformly to all property-owners. Gross injustice and discrimination would surely result if each requisitioning agency of the government were permitted to improvise and impose its own ideas of "adequate" compensation for wartime requisitions.

4. Instead of being "excessive", the rate of $2.50 actually was in accordance with the government's own "roll-back" program, as the petition in No. 273 shows (pp. 11-12). That rate was merely the equivalent of the *Hawaiian's* earning power under the requisition time charter rate of $4.35. Therefore, it seems absurd for the government to characterize as "unjust to the public", a rate of earnings derived from its own determination of just compensation. That is especially so because the gov-

ernment itself, immediately before initiating its "roll-back" program had approved a time charter rate of $7.50 which produced earnings of $5.61 (Finding No. 16, App. 98).

5. The rate of $1.25 proposed by the government was manifestly unfair to shipowners as a class. No other American industry was subjected to similar treatment. When the rate was announced, the War Shipping Administrator stated to Congress (Finding No. 28, App. 109-110) that it represented a level "below actual earnings of 1940 and not greatly in excess of earnings of 1939[15] • • • and about ⅓rd of the actual earnings of 1941 [and] less than the average bareboat rates charged by the Maritime Commission in 1940 and 1941" (Finding No. 28, App. 109-110).

In the same statement (Pl. Ex. 51 at p. 4), it was admitted that the earnings of Class I railroads had "increased approximately 1800 percent over 1939" and that the profits of manufacturing and mining industries had "increased in 1943 to 400 per cent of 1939 levels, before taxes."

Conclusion.

The Cross-petition should be denied,

Respectfully submitted,

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[15] The rate of $1.25 was less than this shipowner's actual average earnings of $1.27 from domestic operations in intercoastal trade on voyages terminating in the last quarter of 1939. (Finding No. 10, App. 93.)